

Supreme Court, U. S.

FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.

76-947

RODEWAY INNS OF AMERICA, INC., a Corporation,
and
MADESCO INVESTMENT CORPORATION, a Corporation,
Petitioners,

vs.

MAURICE B. FRANK and OCEAN SEA BREEZE, INC., a Corporation,
General Partners of MANSION HOUSE MOTOR HOTEL COMPANY, a
Limited Partnership,

and

REMSCO MANAGEMENT, INC., a Corporation,

and

MAURICE B. FRANK and MANSION HOUSE CENTER SOUTH RE-
DEVELOPMENT CORPORATION, a Corporation, General Partners of
MANSION HOUSE CENTER SOUTH REDEVELOPMENT COMPANY,
a Limited Partnership,

and

CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT OF THE
UNITED STATES OF AMERICA,
Respondents,

vs.

CITY OF ST. LOUIS,
Intervenor.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Eighth Circuit

EUGENE PORTMAN
611 Olive Street, Suite 2150
St. Louis, Missouri 63101
314-621-3535

THEODORE D. PONFIL
130 South Barnston
Clayton, Missouri 63105
314-863-0800

Attorneys for Petitioners



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CITY OF ST. LOUIS,
Intervenor.

PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals for the Eighth Circuit

Rodeway Inns of America, Inc., and Madesco Investment Corporation, your petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States

Court of Appeals for the Eighth Circuit entered in the above cause on September 13, 1976.

OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals for the Eighth Circuit on September 13, 1976, in an opinion officially reported at 541 F. 2nd 759 (1976), reproduced herein at A-6 *infra*. On October 12, 1976, the Court of Appeals denied petitioner's petition for rehearing and suggestion of appropriateness of rehearing en banc, not officially reported, reproduced at A-38 herein, *infra*.

On May 27, 1975, the United States District Court, Eastern District of Missouri, Eastern Division, Judge John F. Nangle presiding, Civil Action No. 74-641 C (4) granted defendant's motions for summary judgments and dismissed petitioner's Amended Complaint with prejudice. The Order and Supporting Memorandum are not reported but are reproduced herein at A-23.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on September 13, 1976 (A-6). A timely petition for rehearing with suggestions of appropriateness of rehearing en banc was denied on October 12, 1976, (A-38), and this petition was filed within ninety (90) days after that date.

The jurisdiction of this Court is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

I

Do competing hotels have standing to challenge a decision of the Secretary of Housing and Urban Development, arrived at in an unlawful, arbitrary and capricious manner, permitting an apartment project to be converted to a hotel?

II

Do competing hotels have standing to challenge a decision of the Secretary of Housing and Urban Development permitting conversion of an apartment project to a hotel when such decision was the result of corruption, collusion, dishonesty, fraud and intentional wrongdoing?

III

Does the National Housing Act prohibit an apartment project built with the aid of federally insured mortgage funds and the subject of a Secretary-held mortgage and Regulatory Agreement from being converted to and used as a hotel?

IV

Did the Eighth Circuit Court of Appeals apply the proper standard in reviewing the District Court's determination of state law when it affirmed such decision on the sole basis that no clear error was shown?

STATUTES INVOLVED

The statutes involved herein are the National Housing Act, 12 USC § 1701 et seq., particularly § 1731(b), and § 1715k (d)(3)(B)(iv), and the Administrative Procedure Act, 5 USC § 701 et seq.

Sections 1731b(a) and § 1715k (d)(3)(B)(iv) are as follows:

§ 1731b. Prohibition Against Use of Insured Multifamily Housing for Transient or Hotel Purposes—Intent of Congress

(a) The Congress declares that it has been its intent since the enactment of this chapter that housing built with the aid of mortgages insured under this chapter is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding.

§ 1715k (d)(3)(B)(iv)

(d) To be eligible for insurance under this a mortgage shall meet the following conditions:

(3) The mortgage shall— . . .

(B)(iv) include such nondwelling facilities as the Secretary deems desirable and consistent with the urban renewal plan: Provided, that the project shall be predominantly residential and any nondwelling facility included in the mortgage shall be found by the Secretary to contribute to the economic feasibility of the project, and the Secretary shall give due consideration to the possible effect of the project on other business enterprises in the community.

A STATEMENT OF THE CASE

Petitioner, Rodeway Inns of America, Inc., operates a hotel located in downtown St. Louis, Missouri. Petitioner, Madesco Investment Corporation, is an independent, locally-owned hotel, doing business as Bel Air Hilton, also in downtown St. Louis, Missouri.

Petitioner, Madesco, is situated on property abutting an urban redevelopment project known as the Mansion House Center Complex, (herein the Complex), built pursuant to § 1715k of the National Housing Act (12 USC 1715k). The complex, completed in 1967, consists of three 28 story towers containing 416 apartment units in each structure. The towers, separately owned by 3 different limited partnerships as tax sheltered investments, were designed for non-transient, residential rental occupancy in order to secure Department of Housing and Urban Development (herein HUD) insurance on the mortgages obtained from private mortgage lenders. The 3 mortgages on the Complex totaled over \$36,000,000.00, making this project the largest of its kind in the country. From its completion and until 1974, the Complex was operated as apartment housing pursuant to the statutory directives of the National Housing Act and established HUD policy.

From the outset, the Complex was plagued by financial difficulties due to over-inflated mortgages. Despite several loan modification agreements permitting deferrals of principal and interest installments, the Complex defaulted in paying its 3 mortgages. The default precipitated an assignment of the mortgages in February, 1972, to HUD by the private mortgage lenders in return for HUD's payment of 99% of the outstanding debt to the private mortgage lenders. Prior to foreclosure, effective before and after assignment HUD controls property use by a "Regulatory Agreement" executed by the mortgagor.

In the wake of the assignment, rumors about the conversion of the South Tower of the Complex to hotel use caused petitioners and other hotel operators in St. Louis to seek assurances from HUD that such conversion would not occur. HUD replied that as long as the mortgages were insured, or HUD-held, the Department would not permit conversion of any tower to a hotel. Petitioners and other St. Louis hotel operators relied on HUD representations and took no further action at that time. In the meantime, the then general partner of the limited partnership owning the South Tower began vacating residential tenants in the tower in anticipation of conversion to hotel use.

Financial difficulties at the Complex persisted and negotiations began between HUD, as holder of the mortgages, and the limited partnership, as mortgagor, to resolve the problems. Under the National Housing Act, HUD has discretion to deal with defaulted mortgagors in promising cases only; in practice there was a HUD policy of foreclosure and acquisition of the property unless it was demonstrated that there existed the possibility of reinstatement of debt service within a reasonable period to time. The limited partnership submitted financial projections, based on use of each tower as apartment housing, purporting to show that given certain further capital contributions full debt service could be resumed in 1977. In August, 1972, HUD entered into the Third Modification Agreement with the mortgagors providing for an unprecedented five year moratorium on all debt payment. The approval for this modification was given by Deputy Assistant Secretary for Housing Management, G. Richard Dunnells (herein Dunnells). Within 6 months after granting approval for the modification agreement, Dunnells resigned his position and immediately became attorney for the Mansion House Complex at \$2500 per month retainer. Not only had Dunnells in his official position granted approval for the Third Modification Agreement, but the uncontradicted evidence before the Court disclosed that prior to this decision by Dunnells to grant this extraordinary relief he had become

friendly with certain representatives of the wealthy limited partners and at their request visited the home offices of one of the mortgagees, John Hancock Mutual Life Insurance Company, and attempted to prevent it from exercising its right to foreclose or assign the mortgage by informing its senior vice-president that his contemplated action would be viewed unfavorably by the White House. Contrary to the basis upon which the agreement with HUD was supposedly predicated, the general partner continued reducing residential occupancy of the South Tower in anticipation of hotel conversion. By September, 1973, HUD became aware of the physical conversion for hotel purposes.

The former HUD official Dunnells who had granted the 5 year moratorium based upon residential apartment use surreptitiously guided the requested approval for a change to hotel use through HUD administrative channels. Dunnells' connection with the project in his official capacity forced him to ultimately cease his representation because of the obvious conflict of interest. Furthermore, despite the fact that HUD's St. Louis office demanded that the unlawful conversion of the premises cease, the general partner with full knowledge and approval of high level HUD officials expedited the conversion.

During the decision-making process, various HUD officials recommended that HUD obtain independent feasibility studies with respect to the proposed conversion, investigate the business practices of the general partner, review the tax aspects of the plan, and obtain review of the management of the Complex by an expert. In each instance high level officials of HUD refused to follow the recommendations. Although aware that conversion was taking place, HUD officials denied such knowledge during Congressional hearings in which HUD handling of certain projects came under scrutiny. The St. Louis office continued to advise the Washington office of its suspicions and of evidence that funds were being diverted by the general partner to carry on the illegal conversion, but the local director was instructed by high level HUD officials in Wash-

ington to refrain from interfering and was ultimately informed that matters pertaining to the Complex would be handled at the Washington level.

Although the St. Louis local director was successful in obtaining a legal commitment from the general partner of a \$500,000 payment in exchange for HUD's consideration of possible hotel use, again HUD officials at the highest level made the decision not to demand such payment. HUD officials, in their depositions, admitted that the fact that the limited partners were Henry Ford, Harold Geneen and other ITT and Ford family individuals was an important consideration in HUD's decisions. In almost all internal HUD memoranda, the writer would point out that the limited partners owning the Complex numbered among them "certain influential persons", namely certain ITT officials and members of the Ford family. HUD officials also admitted that they were aware of the grave tax consequences that the limited partners would suffer in the event of foreclosure. Moreover, these same officials were aware that the time of termination of the modification agreement coincided with the time at which substantial tax liability on the part of the limited partners would cease.

Instead of making an independent feasibility study, HUD's Washington officials accepted financial projections from the general managing partner which, they admitted, were suspect and could not be used except as window dressing. Lacking any concrete information, HUD approved the hotel conversion in November, 1974. HUD's decision ignored the housing need in St. Louis and that the Complex could have been fully rented for its intended use as apartments. Substantial evidence in the record confirmed that the financial plight of the Complex was the result of mortgagor mismanagement, rather than lack of residential demand.

Within ten days after entering into the agreements allowing the hotel use, and for the first time in its history agreeing to

subordinate a \$12,000,000 mortgage to a \$2,000,000 loan by a lender of the general partner, HUD admitted it was aware that illegal diversions were taking place by the general partner and that these diversions were used to finance the hotel conversion. Because of pressure from the St. Louis office, the handling of the Complex was taken over by the HUD General Counsel who ordered an audit. That audit has resulted in the appointment of a receiver and a demand that the limited partners pay arrearages of approximately \$10,000,000. Because conversion to hotel use of property subject to HUD-held mortgages was unprecedented, the Department admitted it lacked the expertise necessary to make a reasoned decision concerning such conversion but refused an offer by the Petitioners to pay up to \$50,000 for an independent feasibility study by experts selected by HUD. HUD admitted, in making its decision, it gave no consideration to the impact of hotel conversion on competing hotels.

Petitioner filed suit on September 12, 1974, in Federal District Court for the Eastern District of Missouri, seeking to enjoin the conversion of the South Tower as a hotel. The jurisdiction of the District Court was invoked pursuant to 28 USC §1331(a) and 1332, 12 USC 1731b and pendent jurisdiction. Petitioners contended inter alia in their Amended Complaint that operation of the South Tower as a hotel violated specific provisions of the National Housing Act (12 USC 1701 et seq.) and that the decision by HUD permitting such conversion was arbitrary, capricious and an abuse of discretion. Petitioners further alleged that the decision was tainted with fraud, made in bad faith, and was an intentional wrongdoing on the part of the Department. Moreover, Petitioners, after extensive pre-trial discovery, were prepared to prove at trial on the merits, their allegations that the HUD decision to permit conversion to a hotel was the result of fraudulent conduct, with HUD's knowing participation in the fraudulent scheme. The Petitioner's complaint also included allegations that operation of the

South Tower as a hotel violated a St. Louis City Redevelopment Ordinance, Ordinance 50033, as amended and a claim under State law of unfair competition.

On May 27, 1975, the District Court granted Defendant's Motion for Summary Judgment holding that the decision to allow conversion did not violate the National Housing Act and that Petitioners had no standing to raise their other claims. Petitioners appealed to the U.S. Court of Appeals for the Eighth Circuit. The jurisdiction of the United States Court of Appeals was invoked pursuant to 28 USC §1292(a)(1) and Federal Rules of Appellate Procedure 3 and 4(a). On September 13, 1976, the Court issued its opinion affirming the District Court's grant of Summary Judgment against petitioners. Petitioners filed a timely petition for a rehearing or in the alternative a Rehearing En Banc which was denied.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Decision Below Is in Conflict With the Decisions of This Court and Is Inconsistent With the Decisions of Other Courts of Appeal in Applying This Court's Zone of Interest Requirement for Standing.

In *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), and in *Barlow v. Collins*, 397 U. S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970), this Court set forth the criteria for competitor's standing to seek judicial review of administrative actions by government agencies. In these cases, it was held a competitor who suffers "injury-in-fact" and who "arguably comes within the zone of interest of a relevant statute" is entitled to judicial review, if other criteria are met. In this case Petitioners, as competing hotel owners, sought judicial review of the decision of the Secretary of the Department of Housing and Urban Development allowing the conversion of a redevelopment project from residential use to transient hotel use. The Eighth Circuit decision construing this Court's standing criterion—that a competitor be arguably within the zone of interest of a relevant statute—permits a competitor to question agency action only if he can demonstrate a statutory right and violation of that right by the agency and on no other grounds. This construction is erroneous and conflicts with this Court's decisions in *Data Processing*, supra, and *Barlow*, supra, which make it clear that a party once having standing within the meaning of a relevant statute may assert both statutory and non-statutory grounds to challenge the administrative decision in dispute. In this particular case, both the District Court and the Eighth Circuit found Petitioners had standing but then refused to allow Petitioners to invoke the provisions of the Administrative Procedure Act (5 U.S.C. 1701 et seq.) and restricted review of the agency action to the question of whether or not the agency had violated specific

statutory provisions of the National Housing Act. By its restrictive and narrow view of standing the Court below confused the merits of whether there has been a statutory violation with the concepts of standing set forth by this Court. Under the Eighth Circuit's ruling it is clear if a Plaintiff were required to demonstrate a statutory violation in order to have standing, there would be no need to invoke the benefits granted by the provisions of the Administrative Procedure Act. The effect of the Eighth Circuit decision is to emasculate the holding of this Court that a Petitioner be arguably within the zone of interest of a relevant statute and equally to emasculate the benefits of the Administrative Procedure Act.

Clearly, a decision contrary to and in conflict with this Court's decision as well as being inconsistent and in conflict with the decision of the Third Circuit Court of Appeals as set forth in *Davis v. Romney*, 490 Fed. 2d, 1360, Third Circuit 1974, deserves review and clarification by this Court.

The confusion of the Court is particularly apparent by its statement:

"it would be particularly anomalous to hold that competitors who fail to establish a claim under the specific cause of action afforded in §1731b may nevertheless rely upon that statute in standing to raise other claims. Courts must exercise caution in expanding the remedies expressly provided by Congress." 541 F.2d 759, 766.

Contrary to the Court's statement it would not be anomalous to hold that a competitor who is unable to establish that an agency has violated a specific provision of its governing statute nevertheless may question an administrative decision as being arbitrary and capricious. The Court's statement that this would be expanding the remedies expressly provided by Congress is illustrative of the confusion of the statutory merits of a controversy with the scope of review provided by the Administrative Pro-

cedure Act to those aggrieved by agency action. The fact that a statute is sufficient to grant standing is not an expansion of the statutory remedy afforded to a party by that statute. Not only does the Eighth Circuit decision restrict claimants to standing only where a statutory violation can be demonstrated, it also restricts the "relevant interest" criterion to a time frame instead of properly focusing on whether Congress expressed concern in the NHA that a competitor has an interest entitled to protection. Such a concern was evidenced by § 1715k(d)(3)(B) (iv) of the NHA. In short, the decision of the Eighth Circuit restricts standing of a party aggrieved by administrative action to his explicit statutory right and if the administrative action is otherwise unlawful, precludes use of statutes conferring rights and remedies evidencing a Congressional concern for Petitioners' interests.

II. The Decision Below With Respect to the Availability of a Remedy for a Competitor Injured by Virtue of Fraud, Bad Faith, Misrepresentation, and Intentional Wrongdoing on the Part of a Governmental Agency Is an Important Federal Question Which Should Be Passed on by This Honorable Court.

Petitioners alleged and, in the extensive pretrial discovery which they conducted, established that the decision to allow the conversion of a redevelopment project from residential to transient hotel use by the officials of the Department of Housing and Urban Development was the result of bad faith, wrongful motives, fraud, misrepresentation, and intentional wrongdoing. The Court below by its decision refused to allow Petitioners a remedy and, specifically, a trial on the merits of their claim, notwithstanding their allegations, and proof of their allegations, as demonstrated by the voluminous records, documents, depositions, and other material submitted to the lower Courts in this cause. This Court has never specifically ruled upon the right to judicial review by a claimant who has been injured by ad-

ministrative action which results from intentional wrongdoing. Petitioners submit that proof of such intentional wrongdoing, causing them injury in fact, is sufficient to entitle them to judicial relief. In view of the vast size of the federal bureaucracy affecting the lives and property of the citizens, inhabitants, and business enterprises of this nation, this case presents the Court with an opportunity to make a definitive, clear and unequivocal statement and mandate that fraudulent conduct by members of the bureaucracy which cause injury in fact to a claimant will, under appropriate circumstances, entitle the injured party to injunctive relief.

III. The Question Presented, With Respect to the Statutory Interpretation of the National Housing Act, Is an Important Federal Question Which Should Be Passed on by This Honorable Court.

The decision of the Eighth Circuit, construing and interpreting the National Housing Act as permitting the use of an apartment complex built with the aid of federally insured mortgage funds and the subject of a Secretary-held mortgage and regulatory agreement being converted to and used as a hotel was based upon a construction and interpretation of the National Housing Act which is contrary to the intent of Congress and produces an absurd, illogical and unjust result. See e.g. *United States of America v. American Trucking Association*, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345 (1945); *Holy Trinity Church v. United States*, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892).

The issue is one of interpretation and construction of the National Housing Act as it pertains to the authority of HUD when HUD holds the mortgage, and specifically if the National Housing Act allows conversion of an entire project to transient or hotel use. The Eighth Circuit's opinion refused to directly

address itself to this issue but did so indirectly by interpreting and construing two sections of the National Housing Act—Sections 1731b and 1715k(d)(3)(B)(iv)—as not prohibiting such use and therefore approving, at least implicitly, that what is not prohibited must be allowed. In doing so the Court not only failed to properly recognize Congressional intent, but further produced a result which is absurd, illogical and unjust in that it, among other things, gives a premium to defaulting mortgagors by placing them in a more favorable position after default than they would be prior to default. All of the parties and the courts below acknowledged that had there been no default, the limited partnership owning the complex could not have converted to hotel use, nor could HUD have granted approval for such conversion. Moreover, the Eighth Circuit's interpretation encourages both HUD and mortgagors to disregard expressed Congressional purposes and aims. It does so in that it allows the conversion of needed housing simply because of HUD's inability to adequately and properly appraise financial risk or to exercise its responsibility to prevent mortgagor mismanagement. The decision will open the floodgates to many mortgagors, both marginal and unscrupulous, who see in it the opportunity to convert housing needed for residential purposes to more hopefully financially rewarding hotel use. It provides as it has in this case, a shield for HUD officials in Washington to escape the responsibility for their mistakes and lack of competence by merely allowing HUD to authorize the use of property for purposes entirely foreign to the Congressional mandate creating HUD or the statute authorizing the complex.¹ In

¹ Not only is the record in this case replete with evidence of HUD ineptness, in deciding to enter into the hotel field, but subsequent events have confirmed the government's folly. Thus, instead of solving HUD's problem, it has expanded, as illustrated by the fact that HUD has had to have a receiver appointed for this Complex in Federal Court in St. Louis, and is involved in extensive bankruptcy litigation filed by the Complex's General Partners in Orlando, Florida, and has had to file suit against the owner for approximately \$10,000,000 in Federal Court in St. Louis.

essence and in fact the Eighth Circuit's decision has taken the federal government out of the noble endeavor of aiding in the cause of furnishing a "decent home for every American family" and plunged it into the hotel business. In light of the fact that there are presently thousands upon thousands of residential units which are the subject of HUD held mortgages and "Regulatory Agreements" and which similarly could be converted to hotel use, this decision, if permitted to stand, could have a devastating effect on the hotel and motel industry. Petitioners submit that the ramifications and magnitude of this aspect of the national housing policy merits the attention of this Court.

IV. This Court Should Exercise Its Supervisory Powers Over Lower Federal Courts to Require Lower Federal Appellate Courts to Review District Court Determinations of State Law Under a Stricter Standard Than the Clear Error Rule.

The court below decided an appeal of the decision denying Petitioner's standing to enjoin violation of a municipal ordinance by invoking a cursory review rule limiting trial court reversal to only those cases of clear error. However, in deference to inherent federal court limitations in construing state law, the question presented was nonetheless a question of law which arguably requires the same thoughtful and careful analysis that would be applied by a state appellate court. Moreover, such cursory examination effectively closes the door to litigants seeking to press meritorious state claims. Such a rule puts litigants who choose a federal forum at a disadvantage and encourages them to bring suit in both state and federal courts resulting in added expense to litigants and burdens on the judicial system.

CONCLUSION

The various issues presented by this cause are of maximum national importance and, therefore, it is respectfully requested that this Court issue a Writ of Certiorari to review the decision below.

Respectfully submitted,

EUGENE PORTMAN

611 Olive Street

St. Louis, Missouri 63101

(314) 621-3535

THEODORE D. PONFIL

130 South Bemiston Avenue

Clayton, Missouri 63105

(314) 863-0800

Attorneys for Petitioners

APPENDIX

— A-1 —

APPENDIX A

Title 12 U.S.C.

§ 1731b. Prohibition Against Use of Insured Multifamily Housing for Transient or Hotel Purposes—Intent of Congress

(a) The Congress declares that it has been its intent since the enactment of this chapter that housing built with the aid of mortgages insured under this chapter is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding.

Exceptions to prohibition

(b) Notwithstanding any other provisions of this chapter, no new, existing, or rehabilitated multifamily housing with respect to which a mortgage is insured under this chapter shall be operated for transient or hotel purposes unless (1) on or before May 28, 1954, the Secretary has agreed in writing to the rental of all or a portion of the accommodations in the project for transient or hotel purposes (in which case no accommodations in excess of the number so agreed to by the Secretary shall be rented on such basis), or (2) the project covered by the insured mortgage is located in an area which the Secretary determines to be a resort area, and the Secretary finds that prior to May 28, 1954, a portion of the accommodations in the project had been made available for rent for transient or hotel purposes (in which case no accommodations in excess of the number which had been made available for such use shall be rented on such basis).

Certification as to use as requisite for insurance; exceptions to prohibition against insuring

(c) Notwithstanding any other provisions of this chapter, no mortgage with respect to multifamily housing shall be insured under this chapter (except pursuant to a commitment to insure issued prior to August 2, 1954), and (except as to housing coming within the provisions of clause (1) or clause (2) of subsection (b) of this section) no mortgage with respect to multifamily housing shall be insured for an additional term, unless (1) the mortgagor certifies under oath that while such insurance remains outstanding he will not rent, or permit the rental of, such housing or any part thereof for transient or hotel purposes, and (2) the Secretary has entered into such contract with, or purchased such stock of, the mortgagor as the Secretary deems necessary to enable him to prevent or terminate any use of such property or project for transient or hotel purposes while the mortgage insurance remains outstanding.

Enforcement by Secretary

(d) The Secretary is authorized and directed to enforce the provisions of this section by all appropriate means at his disposal, as to all existing multifamily housing with respect to which a mortgage was insured under this chapter prior to August 2, 1954, as well as to all multifamily housing with respect to which a mortgage is hereafter insured under this chapter: *Provided*, That no criminal penalty shall, by reason of enactment of this section, be applicable to the rental or operation of any such existing multifamily housing in violation of any provision of subsection (b) of this section at any time prior to August 2, 1954.

Definitions

(e) As used in this section, (1) the term "rental for transient or hotel purposes" shall have such meaning as prescribed by the Secretary but rental for any period less than thirty days shall in any event constitute rental for such purposes, and (2) the term "multifamily housing" shall mean (i) a property held by a mortgagor upon which there are located five or more single family dwellings, or upon which there is located a two-, three-, or four-family dwelling, or (ii) a property or project covered by mortgage insured or to be insured under section 1713 of this title, under section 1715e of this title with respect to any property or project of a corporation or trust of the character described in paragraph (1) of subsection (a) thereof, under section 1715k of this title if the mortgage is within the provisions of paragraph (3)(B) of subsection (d) thereof, under section 1715l of this title if the mortgage is within the provisions of paragraph (3) of subsection (d) thereof, under section 1743, 1748b, or 1750g of this title, or (iii) a project with respect to which an insurance contract pursuant to subchapter VII of this chapter is outstanding.

Investigation after notice of violation; cease order

(f) Promptly after receipt of written notice that any portion of any building is being rented or operated in violation of any provision of this section or of any rule or regulation lawfully issued thereunder, the Secretary shall investigate the existence of the facts alleged in the written notice and shall order such violation, if found to exist, to cease forthwith.

Prosecution by Attorney General for continued violation

(g) If such violation does not cease in accordance with such order, the Secretary shall forward the complaint to the Attorney

General of the United States for prosecution of such civil or criminal action, if any, which the Attorney General may find to be involved in such violation.

Judicial procedure for injunction or other order

(h) Whenever he finds a violation of any provision of this section has occurred or is about to occur, the Attorney General shall petition the district court of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the persons doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices, and upon a showing by the Attorney General that such acts or practices constituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond.

Injunctive relief for hotel owners

(i) Any person owning or operating a hotel within a radius of fifty miles of a place where a violation of any provision of this section has occurred or is about to occur, or any group or association of hotel owners or operators within said fifty-mile radius, at his or their sole charge or cost, may petition any district court of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, or an order enjoining such acts or practices, and, upon a showing that such acts or practices constituting such violation have been engaged in or are about to be en-

gaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted.

Jurisdiction of district courts

(j) The several district courts of the United States and the several district courts of the Territories of the United States or other place subject to United States jurisdiction, within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation shall be found, shall, wheresoever such acts or practices may have been done or committed, have full power and jurisdiction to hear, try, and determine such matter under subsections (h) and (i) of this section.

* * * * *

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 75-1563

Rodeway Inns of America, Inc., a Corporation,
and
Madesco Investment Corporation, a Corporation,
Appellants,

v.

Maurice B. Frank and Ocean Sea Breeze, Inc., a Corporation,
General Partners of Mansion House Motor Hotel Company,
a Limited Partnership,

and

Remsco Management, Inc., a Corporation,
and

Maurice B. Frank and Mansion House Center South Redevelop-
ment Corporation, a Corporation, General Partners of Man-
sion House Center South Redevelopment Company, a Limited
Partnership,

and

Carla A. Hills, Secretary of the Department of Housing and
Urban Development of the United States of America,
Appellees.

Appeal from the United States District Court for the
Eastern District of Missouri

Submitted: June 16, 1976

Filed: September 13, 1976

Before Bright, Ross, and Stephenson, Circuit Judges.

Bright, Circuit Judge.

When the owners of the South Tower of the Mansion House Center, an apartment building located in an urban renewal area of downtown St. Louis, Missouri, began converting the Tower into a hotel, competitor hotel owners filed this lawsuit against the owners of the South Tower and the Secretary of the Department of Housing and Urban Development (HUD), the latter having approved the conversion decision. The plaintiffs sought an injunction, asserting that, because the construction of this building had been financed through loans insured by HUD, the conversion to a hotel was barred by specific provisions of the National Housing Act. Plaintiffs also complained of unlawful procedures relating to HUD's consent to the conversion decision and that the conversion action violated state law and the ordinances of St. Louis, Missouri. The district court dismissed the action for failure to state a claim of violation of any provision of the National Housing Act and for lack of standing to raise the remaining claims. The plaintiffs brought this appeal. We affirm.

Plaintiffs-appellants, Rodeway Inns of America, Inc., and Madesco Investment Corporation, own and operate hotels within the City of St. Louis. They allege that conversion of the apartment tower into a hotel will subject them to competitive injury through the diversion of customers. Defendant-appellee Carla A. Hills, Secretary of HUD, is responsible for the administration of the NHA and presently holds the mortgage to the apartment tower. Subject to HUD regulation, the tower is

owned and operated by the private mortgagors, defendants and appellees in this action.¹

Appellants level broad-based attacks against the conversion decision. The district court divided these challenges into five groups:

1) The Secretary's conversion decision violates the National Housing Act, 12 U.S.C. § 1701 *et seq.*, especially §§ 1715(d) (B) (iv) and 1731b, HUD regulations, and long-standing HUD policy.

2) The Secretary's decision to allow conversion is improper and unauthorized by statute because (a) plaintiffs were not afforded an opportunity for a hearing on the decision; (b) the decision was arbitrary and capricious; and (c) the decision resulted from improper methods used by the private defendants to persuade the Secretary to allow conversion.

3) The private defendants through misrepresentation induced the Secretary to consent to a Third Modification Agreement which provided for the deferment and capitalization of principal and interest payments then outstanding and those which would become due during the period August 1, 1972, through July 31, 1977. Plaintiffs also challenge the Secretary's decision to permit the lien of its mortgage to become junior to a newly arisen bank claim and assert that the Secretary has failed to enforce certain duties of the private defendants imposed by the mortgage and ancillary agreements.

¹ The following are the private defendants-appellees: Maurice B. Frank and Mansion House Center South Redevelopment Corporation, general partners of Mansion House Center South Redevelopment Company, a limited partnership; Frank and Ocean Sea Breeze, Inc., general partners of Mansion House Motor Hotel Company, a limited partnership; and Remso Management, Inc.

The fee interest in the land underlying the tower is held by the General Electric Pension Trust and is unaffected by the present action.

4) The conversion violates St. Louis City Ordinance No. 50033; Chapter 353, Revised Statutes of Missouri; and Article I, Section 10 of the Missouri State Constitution.²

5) The actions of the Secretary in this matter violate the equal protection and due process clauses of the fourteenth amendment to the Constitution of the United States.³

As to the first claim, the court determined that appellants (Competitors) failed to state any claim of violation of the National Housing Act, HUD regulations or HUD policy. As to the portions of the second, third, and fourth groups which remain in issue on appeal, the district court denied standing to these Competitors. For reasons stated below, we agree with the district court's determination.

In resolving the threshold questions of standing and failure to state a claim, the district court relied upon additional factual background, which we quote:

The Mansion House Center was constructed as an urban blighted area redevelopment project authorized by [St. Louis] City Ordinance No. 50033 (approved December 5, 1963), pursuant to Chapter 353, Revised Statutes of Missouri. This ordinance provided for development within the City in an area bounded by Third Street, Chestnut

² The claim based on Article I, Section 10 of the Missouri Constitution has been abandoned on appeal.

³ This constitutional claim is not pressed on appeal. As to this claim, the district court said:

Plaintiffs' fifth claim, for violation of the Fourteenth Amendment, must be dismissed for the reason that no economic loss sustained by the plaintiffs is alleged or shown to be caused by a direct intrusion, encroachment or appropriation of plaintiffs' property. *Woodland Market Realty Co. v. City of Cleveland*, 426 F.2d 955, 958 (6th Cir. 1970). There is no factual allegation or showing that plaintiffs were not afforded equal protection of law. This claim will be dismissed for failure to state a claim upon which relief can be granted.

Street, Fourth Street, and Washington Boulevard. It further provided for the erection of three twenty-eight story apartment buildings (the three towers of the Mansion House Center) each containing approximately three hundred thirty-six apartment units, and of four commercial and office buildings not higher than ten stories.

In 1967 the Secretary insured the leasehold mortgage and note liability that encumbered the Mansion House Center south tower, pursuant to § 220 of the National Housing Act, as amended, 12 U.S.C. § 1715k (urban redevelopment). In 1971 the mortgagor defaulted on the note liability. The mortgagee-lender, John Hancock Mutual Life Insurance Company, applied for and in 1972 received \$12,015,769.07 in mortgage insurance proceeds from the Secretary. In exchange, on February 11, 1972, the mortgagee assigned the note and the mortgage to the Secretary. Thereafter, the Secretary decided to allow the mortgagor to operate the south tower as a hotel instead of as an apartment complex as it had been operated originally. (Footnotes omitted).

The district court also observed that plaintiffs own or operate hotels within 50 miles of the Mansion House South Tower and determined that appellants alleged sufficient economic loss through the diversion of customers to the newly-converted hotel to create a justiciable controversy.

I. Specific Violations of the NHA.

We initially address the appellees-defendants' assertion that appellants lack standing even to assert their claim alleging specific violations of the National Housing Act.

Section 513 of the National Housing Act, 12 U.S.C. § 1731b, provides in pertinent part:

(a) The Congress declares that it has been its intent since the enactment of this chapter that housing built with the aid of mortgages insured under this chapter is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding.

(b) Notwithstanding any other provisions of this chapter, no new, existing, or rehabilitated multifamily housing with respect to which a mortgage is insured under this chapter shall be operated for transient or hotel purposes unless [exceptions inapplicable].

* * * * *

(i) Any person owning or operating a hotel within a radius of fifty miles of a place where a violation of any provision of this section has occurred or is about to occur, or any group or association of hotel owners or operators within said fifty-mile radius, at his or their sole charge or cost, may petition any district court of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices[.]

* * *

The statute specifically declares that housing built with the aid of federally insured mortgages under the NHA is to be principally residential while the insurance remains outstanding. Congress in this statute has conferred a specific right of action on competing hotel owners or operators to seek injunctive relief against acts or practices "constituting the alleged violation of this section * * *."

Thus as to claim 1, the record discloses that these Competitors claiming injury assert a right of action specifically con-

ferred by statute. These allegations establish standing. As the Supreme Court has said:

It is, of course, true that "Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions," *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972). But Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute. See, e.g., *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring); *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6 (1968). [*Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973).]

Moreover, plaintiffs-appellants' allegations of economic injury are sufficient to meet the demands of Art. III, see *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 151-53 (1970). Thus, the district court properly granted these competitor hotels standing to assert that defendants' conduct violated the National Housing Act, including HUD regulations and policy.

The district court, however, determined on the merits that the facts alleged make out no statutory violation. The district court held that the proscriptions of the statute apply only so long as the mortgage insurance remains *outstanding*. The language of the statute, reinforced by the legislative history, establishes the correctness of that conclusion. Where, as here, the Government has paid the insurance proceeds to the initial mortgagee and has become the successor mortgagee, its conduct in authorizing the mortgaged premises to operate as a hotel does not violate any provision of the NHA.

Congress adopted the provisions of § 1731b in 1954, in response to complaints by the hotel industry that the government agency supervising the National Housing Act (then the Federal Housing Administration) had failed to enforce strictly the ob-

ligation of insured mortgagors to refrain from operating hotels. Industry representatives testified before Congress concerning the extent of violations and suggested possible remedies. Mr. Arthur J. Packard, chairman of the Board of the American Hotel Association, urged that

it is imperative that a way be found to incorporate definite safeguards into the language of the statute, to insure the fact that FHA will not tolerate transient rentals in any rental housing *so long as the mortgage runs to the government*. [Hearings before the Senate Committee on Banking and Currency, March-April 1954, at 658 (emphasis added) (taken from Appellants' Br. at A-6).]

After considering this and other similar testimony, Congress adopted § 1731b. The introductory paragraph of this section declared the following:

(a) The Congress declares that it has been its intent since the enactment of this chapter that housing built with the aid of mortgages insured under this chapter is to be used principally for residential use; *and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding*. [§ 1731b(a) (emphasis added).]

The language limiting the application of the section to the period "while such insurance on the mortgage remains outstanding" does not appear to be a mere slip of the pen. Similar language appears elsewhere in the section. Section 1731b (b) additionally provides that "no * * * multifamily housing *with respect to which a mortgage is insured* under this chapter shall be operated for transient or hotel purposes [with certain exceptions]." (Emphasis added). Section 1731b(c) forbids insuring or extending the insurance of a mortgage

* * * unless (1) the mortgagor certifies under oath that *while such insurance remains outstanding* he will not rent,

or permit the rental of, such housing * * * for transient * * * purposes, and (2) the Secretary [has taken adequate steps to] prevent or terminate any use of such property or project for transient or hotel purposes *while the mortgage insurance remains outstanding*. (Emphasis added).

Other subsections of §1731b establish enforcement mechanisms for §§1731b(a), (b), and (c). Section 1731b(i), previously quoted, *see* p. 6 *supra*, authorizes competing hotel owners or operators to act as private attorneys-general for the purpose of enjoining "a violation of any provision of this section." By its clear terms, "this section" applies only "while the mortgage insurance remains outstanding." In the present case the mortgage insurance has been terminated, the insurance benefits have been paid to the original mortgagee, and that mortgagee has assigned the mortgage to HUD. Thus, no right to relief exists under §1731b.

Appellants also contend that HUD's own previously long-established interpretation of the National Housing Act accords with the construction of the statute offered by appellants. We reject this contention. The Regulatory Agreement between the mortgagor and HUD dated in April of 1964, provides:

So long as the contract of mortgage insurance continues in effect, and during such period of time as the Commissioner shall be the *owner, holder* or reinsurer of the mortgage, . . . 4(a) . . . such accommodations shall not be rented for a period of less than thirty days. [Appellants' Br. 32-33, with appellants' emphasis added.]

The mortgagor's oath, prepared by HUD, states:

In accordance with the stated intent of Congress and with the provisions of the *National Housing Act*, as amended . . . the undersigned hereby certifies:

That so long as the mortgage covering the above-numbered project is *insured or held* under the provisions of the *National Housing Act*, as amended, no part of any building will be rented for a period of less than thirty days or operated in such a manner as to offer any hotel services to any tenant in the building or buildings. [Appellants' Br. 33, with appellants' emphasis added.]

The oath applies, however, only "so long as the loan is insured." 24 C.F.R. 220.593.⁴

Similarly, the regulatory agreement quoted above applies while "the mortgage insurance continues in effect", not where, as here, the Commissioner [now Secretary] has paid the mortgagee's insurance claim.

While mortgage insurance remains outstanding, NHA housing may not be converted to hotel use. But no statute or regulation expressly bars such use when HUD becomes the lienholder after a mortgage insurance payout. Thus, the district court properly addressed and denied appellants' claim for relief resting upon alleged violations of specific provisions of the National Housing Act.

⁴ This regulation governing the oath reads:

The borrower shall certify under oath, that so long as the loan is insured by the Commissioner, the borrower will not rent, permit the rental or permit the offering for rental of the housing, or any part thereof, covered by such loan for transient or hotel purposes. For the purpose of this certificate, the term rental for transient or hotel purposes shall mean:

(a) Rental for any period less than 30 days; or

(b) Any rental, if the occupants of the housing accommodations are provided customary hotel services such as room service for food and beverages, maid service, furnishing and laundering of linens and bellboy service.

II. Standing as to Nonstatutory Claims.

We next consider appellants' other federal claims—those not grounded upon a specific statutory violation. As we have mentioned, appellants contend that the decision to permit hotel use of the Mansion House South Tower was arbitrary and capricious, did not afford procedural due process to competing hotel owners, and was arrived at through misrepresentations and impermissible conduct within and outside of HUD, wrongfully inducing the agency decision under question. Appellants argue that they are entitled to judicial review of these claims under the Administrative Procedure Act (APA), 5 U.S.C. §§702-706.

Relying on *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), appellants-plaintiffs assert that their interests arguably come within the "zone of interest" of the relevant statute, the National Housing Act, because at least two specific sections advert to the interests of competitors—§1731b, discussed in part I, and 12 U.S.C. §1715k(d)(3)(B)(iv), which reads as follows:

(d) To be eligible for insurance under this section a mortgage shall meet the following conditions:

* * * * *

(3) The mortgage shall—

* * * * *

(B) * * * (iv) include such non-dwelling facilities as the Secretary deems desirable and consistent with the urban renewal plan: *Provided*, That the project shall be predominantly residential and any nondwelling facility included in the mortgage shall be found by the Secretary to contribute to the economic feasibility of the project, *and the Secretary shall give due consideration to the possible effect of*

the project on other business enterprises in the community. (Emphasis added).

Appellant argues that these statutes evidence a legislative intent to protect the interest of the competitor hotel operators—thus conferring standing upon them to challenge the administrative action. We disagree, as did the district court.

The question presented to us in these general federal claims asserted by appellants is whether the statute was designed to protect competitors, *Data Processing*, *supra* at 155; citing *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968), *i.e.*, whether the competitors' interest is arguably within the zone of interests protected by the statute in question. In answering that question, it is necessary that we examine the National Housing Act as a whole, as well as the specific statutory provisions. *Barlow v. Collins*, 397 U.S. 159, 164-65 (1970).

In *Barlow*, the Court examined the Food and Agricultural Act of 1965 as a whole to determine whether tenant farmers eligible for payments under the upland cotton program possessed standing to challenge an administrative regulation issued under that Act which allowed the tenants to assign their payment rights to their landlords. The Court found a "Congressional intent that the Secretary protect the interests of tenant farmers," *id.* at 164, and a similar intent expressed in the history of the specific statutory provisions under consideration.

Utilizing similar analysis, the district court examined the broad goals of the National Housing Act:

The *overall* purposes of the National Housing Act do not include the regulation or protection of competition among hotel operators. The intentions of Congress regarding the Act have been variously described as the "aid[ing of] veterans and their families", *F.H.A. v. The Darlington*,

Inc., 358 U.S. 84, 87 (1958), and the providing of decent homes for persons with low income. *Davis v. Romney*, *supra* at 1365; *Thompson v. Washington*, 497 F.2d 626 (D.C. Cir. 1973). Congress declared the purpose of §220 of the Act (urban development) to be "to aid in the elimination of slums and blighted conditions and the prevention of the deterioration of residential property . . ." 12 U.S.C. §1715k(a).

We agree that appellants' assertion of standing derives no support from the general goals of the NHA. Sections 1715k(d)(3)(B)(iv) and 1731b do provide some protection to hotels from HUD-subsidized competition, but the zones of protection created by those two sections are limited to two specific situations: when the Secretary considers an initial application for mortgage insurance (§1715k(d)(3)(B)(iv)), and when the mortgage insurance is outstanding (§1731b). We have neither situation here. We cannot conclude that two provisions which protect the interests of potential competitors in limited situations were intended by Congress to confer standing on competitors to challenge action taken under the NHA not falling within the areas protected by those two particular provisions. The overall intent of Congress was to aid home construction, not to protect hotel owners from the competitive impact of projects built with government-insured loans. The provisions protecting hotel owners are of limited application only; it is not our prerogative to expand the scope of hotel owners' interests beyond the zones of protection defined by Congress. *Cf. Clinton Community Hospital Corp. v. Southern Maryland Medical Center*, 510 F.2d 1037 (4th Cir. 1975), *cert. denied*, 422 U.S. 1048 (1975) (competitive interests not with NEPA's zone of interests); *compare Warth v. Seldin*, 422 U.S. 490, 512-14 (1975), *with Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring). It would be particularly anomalous to hold that competitors who fail to establish a claim under the specific cause of action afforded in

§1731b may nevertheless rely upon that statute for standing to raise other claims. Courts must exercise caution in expanding the remedies expressly provided by Congress. *See National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453 (1974); *Summers v. United States*, 510 F.2d 123 (8th Cir.), *cert. denied*, 96 S.Ct. 95 (1975). We conclude, therefore, that the competitor hotel owners cannot base their standing upon the specific statutory provisions which they cite. Their general economic interest as competitors does not afford standing. *See Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); *Tennessee Power Co. v. TVA*, 306 U.S. 118 (1939); *Berry v. Housing and Home Finance Agency*, 340 F.2d 939 (2d Cir. 1965); *cf. Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 5-7 (1968); *Clinton Community Hosp.*, *supra*, 510 F.2d at 1038.

The *Data Processing* "zone of interests" requirement reflects a policy of judicial self-restraint relating to standing, apart from the bare demands of Art. III of the Constitution. Whether a litigant possesses standing must be determined from the intent of Congress. Here we can find no Congressional intent expressed in the provisions of the NHA to confer upon hotel owners the right generally to obtain judicial review of administrative decisions, apart from the specific statutes affording certain hotel operators the privilege to litigate under narrow and specific circumstances. We hold the district court properly determined that appellants did not come within the zone of interests entitling them to judicial review of general administrative decisions made by HUD.

III. Claims Resting Upon State Law.

Exercising its discretion to invoke pendent jurisdiction, *see United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), the district court considered the claim that changing the South

Tower into a hotel violates St. Louis City Ordinance No. 50033. The district court held that the appellants lack standing to assert violations of the ordinance. The parties concede that under Missouri law a zoning ordinance confers standing upon adjoining property owners to contest changes in use of property, *Allen v. Coffel*, 488 S.W.2d 671 (Mo. App. 1972); *Stickelber v. Board of Zoning Adjustment*, 442 S.W.2d 134 (Mo. App. 1969).

The ordinance in question approved the redevelopment plan under Missouri's Urban Renewal Law, and authorized the city officials to enter into an appropriate contract with the developers, which, among other things, limits the value of the real estate for tax purposes. Appellants cite no cases from Missouri or any other jurisdiction holding that an urban renewal ordinance should be deemed equivalent to zoning ordinances for purposes of determining standing to sue. *Gibson & Perin Co. v. City of Cincinnati*, 480 F.2d 936 (6th Cir.), *cert. denied*, 414 U.S. 1068 (1973), supports the trial court's decision that the ordinance in question does not provide for zoning of property and therefore does not confer standing upon adjoining property owners.

The opinion of the district court on matters of state law is entitled to great weight here. See *Sherrill v. Royal Industries, Inc.*, 526 F.2d 507, 510 (8th Cir. 1975); *Koppinger v. Cullen-Schiltz & Associates*, 513 F.2d 901, 909 (8th Cir. 1975); *Bassler v. Arrowood*, 500 F.2d 138 (8th Cir. 1974), *cert. denied sub nom. Lee v. Arrowood*, 419 U.S. 1116 (1975). We see no clear error in the court's conclusion and therefore decline to disturb it on appeal.

Appellants also assert that operation of the hotel at the Mansion House constitutes unfair competition cognizable under state law. As stated in their brief, appellants argue:

Plaintiffs' position is simple and to the point. Legitimate businessmen who have spent years of their lives, risked

their fortunes, however great or small, and built their business on the foundation of observance of the law are entitled to the aid of a court of equity to protect their business interests against assault from individuals and government officials who, through fraud, deceit, misrepresentation, chicanery, theft, corruption and perversion of the governmental processes gain or are about to gain an unconscionable [sic] economical business advantage and thereby place themselves in a position to unfairly compete for the ultimate prize, i.e., the customer, consumer or patron, [Appellants' Br. 45.]

In rejecting this unfair competitor claim, the district court said:

Plaintiffs argue orally and in their brief that they have alleged a claim of unfair competition, based upon the conduct of the defendants in obtaining, and upon the Secretary's conduct in granting, the conversion approval. A claim of unfair competition must be founded upon the common law of Missouri. *Fry v. Layne-Western Company*, 282 F.2d 97, 99 (8th Cir. 1960). Plaintiffs have cited no judicial precedent in Missouri supporting their cause of action for unfair competition. The Court does not construe plaintiffs' amended complaint as stating such a claim. The term "unfair competition" is used by plaintiffs for the purpose of stating a claim that 12 U.S.C. §1731b, *infra*, was violated. Assuming that plaintiffs seek to allege unfair competition, as they argue, the Court is of the opinion that they fail to state a claim upon which relief can be granted. As shown below, plaintiffs either lack standing or fail to state a claim regarding those acts of the defendants upon which their claim of unfair competition depends.

Thus, the district court appears to have construed this aspect of the complaint as grounded upon an allegation that appellees

violated §1731b in the conversion decision. We have disposed of the §1731b violation in part I of this opinion. On appeal, however, appellants stress that the claim for unfair competition is one asserted solely under state law arising from improper conduct of appellees, not specifically violative of any federal statute.

Because the district court did not address the issue of unfair competition in this context, we also do not reach the claim.

After reading appellants' amended complaint, we have some doubt that it alleges any claim of unfair competition against the nongovernment appellees, separate and apart from the alleged violation of §1731b. The general language of the complaint justified the district court's reading of the unfair competition allegations as dependent upon the alleged violation of 12 U.S.C. §1731b.

Accordingly, we affirm.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

United States District Court
Eastern District of Missouri
Eastern Division

Rodeway Inns of America, Inc., et al.,	} No. 74-641 C (4)
Plaintiffs,	
vs.	
Maurice B. Frank, et al.,	
Defendants.	

ORDER

Pursuant to the memorandum of the Court filed this date and incorporated herein,

IT IS HEREBY ORDERED that Carla A. Hills, Secretary of the Department of Housing and Urban Development, be and is substituted as a party defendant for James T. Lynn; and

IT IS FURTHER ORDERED that the motions of the defendants for summary judgment be and are granted and plaintiffs' amended complaint is hereby dismissed with prejudice; and

IT IS FURTHER ORDERED that the motion of the plaintiffs for summary judgment be and is denied.

/s/ JOHN F. NANGLE
JOHN F. NANGLE
United States District Judge

Dated: May 27, 1975.

MEMORANDUM

This action is before the Court upon the motions

- 1) of defendants Frank, Ocean Sea Breeze, Inc., Remsco Management, Inc., Mansion House Center South Redevelopment Corporation (collectively "the Mansion House defendants") for summary judgment; and of intervenor defendant City of St. Louis, Missouri, for summary judgment (adopting the motion of the Mansion House defendants);
- 2) of defendant Hills¹ ("Secretary") to dismiss and for summary judgment; and
- 3) of plaintiffs Rodeway Inns of America, Inc., and Madesco Investment Corporation for summary judgment.

By their amended complaint filed January 7, 1975, the plaintiffs claim relief from the acts of the defendants regarding the conversion of the south tower of the Mansion House Center building complex, located in the City of St. Louis, Missouri ("City"), from residential apartment use to transient hotel use. Plaintiffs own or operate hotels within a radius of fifty miles of the Mansion House south tower.

The Mansion House Center was constructed as an urban blighted area redevelopment project authorized by City Ordinance No. 50033 (approved December 5, 1963), pursuant to Chapter 353, Revised Statutes of Missouri. This ordinance provided for development within the City in an area bounded by Third Street, Chestnut Street, Fourth Street, and Washington Boulevard. It further provided for the erection of three twenty-

¹ James T. Lynn, Secretary of the Department of Housing and Urban Development ("H.U.D."), was an original defendant. This Court *sua sponte* judicially notices that Carla A. Hills has succeeded Lynn to the office of Secretary of H.U.D. and the Court will substitute her for Lynn as party defendant. See Fed. R. Civ. Pro. 25 (d)(1).

eight story apartment buildings (the three towers of the Mansion House Center) each containing approximately three hundred thirty-six apartment units, and of four commercial and office buildings not higher than ten stories.

In 1967 the Secretary insured the leasehold² mortgage and note liability that encumbered the Mansion House Center south tower, pursuant to §220 of the National Housing Act, as amended, 12 U.S.C. §1715k (urban redevelopment). In 1971 the mortgagor³ defaulted on the note liability. The mortgagee-lender, John Hancock Mutual Life Insurance Company, applied for and in 1972 received \$12,015,769.07 in mortgage insurance proceeds from the Secretary. In exchange, on February 11, 1972, the mortgagee assigned the note and the mortgage to the Secretary. Thereafter,⁴ the Secretary decided to allow the mortgagor to operate the south tower as a hotel instead of as an apartment complex as it had been operated originally.

The seventeen page amended complaint does not specifically enumerate the several claims of the plaintiffs. Therefore, as a prerequisite to logically treating the subject motions the Court has arranged plaintiffs' allegations into five groups of claims.

Plaintiffs claim, *first*, that the decision of the Secretary to allow the conversion of the south tower from residential apartment use to transient hotel use was reached improperly, *i.e.* that the decision was reached without affording plaintiffs an

² The fee interest is owned by a corporation whose sole stockholder is the General Electric Pension Trust and has been unaffected by the actions which form the basis for this suit.

³ *I.e.*, Mansion House Center South Redevelopment Company, a limited partnership comprised of defendants Maurice B. Frank and Mansion House Center South Redevelopment Corporation.

⁴ By an agreement dated November 26, 1974, H.U.D. agreed with the mortgagor and with Mercantile Trust Company N.A. that the south tower would be converted to hotel use and that the interest of H.U.D. in the property would be junior to the newly created interest of Mercantile by reason of a loan to the mortgagor.

adequate opportunity to be heard on the propriety of the decision, that such decision was, in effect, arbitrary and capricious, and that the Mansion House defendants used improper methods to cause the Secretary to allow the conversion, but that the Secretary thereafter joined in the conversion plan.

Plaintiffs claim, *second*, that the conversion decision of the Secretary violated the National Housing Act (12 U.S.C. §1701 *et seq.*), especially 12 U.S.C. §§1715k(d)(3)(B)(iv)⁵ and 1731b,⁶ H.U.D. regulations, and long-standing H.U.D. policy. Plaintiffs further complain that §1731b was violated by the resulting "unfair competition" and "anti-competitive atmosphere" to which plaintiffs are subjected by the defendants' acts.⁷

⁵ 12 U.S.C. §1715k(d)(3)(B)(iv) provides:

(d) To be eligible for insurance under this section a mortgage shall meet the following conditions: . . .

(3) The mortgage shall— . . .

(B)(iv) include such nondwelling facilities as the Secretary deems desirable and consistent with the urban renewal plan: *Provided*, that the project shall be predominantly residential and any nondwelling facility included in the mortgage shall be found by the Secretary to contribute to the economic feasibility of the project, and the Secretary shall give due consideration to the possible effect of the project on other business enterprises in the community.

⁶ 12 U.S.C. §1731b, §513 of the Act, added August 2, 1954, c. 649, Title I, §132, 68 Stat. 10, provides in pertinent part:

(a) The Congress declares that it has been its intent since the enactment of this chapter that housing built with the aid of mortgages insured under this chapter is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding.

(b) Notwithstanding any other provisions of this chapter, no new, existing, or rehabilitated multifamily housing with respect to which a mortgage is insured under this chapter shall be operated for transient or hotel purposes unless [exceptions inapplicable].

⁷ Plaintiffs argue orally and in their brief that they have alleged a claim of unfair competition, based upon the conduct of the de-

Plaintiffs claim, *third*, that the Mansion House defendants induced the Secretary through misrepresentations to enter a Third Modification Agreement with the mortgagor. This Agreement, effective August 1, 1972, provided *inter alia* for an increase in the outstanding principal balance of the note and that further payments of interest and principal were deferred for the period August 1, 1972 through July 31, 1977. Plaintiffs also allege that the Secretary wrongfully permitted the lien of its mortgage to become junior to a newly arisen bank claim, and that the Secretary has failed to enforce certain duties of the mortgagor.

Fourth, plaintiffs claim that the conversion violates City Ordinance No. 50033; Section 353.110, Revised Statutes of Missouri; and the Constitution of Missouri, Art. I, §10.⁸

Fifth, plaintiffs allege that defendants' acts have violated the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

defendants in obtaining, and upon the Secretary's conduct in granting, the conversion approval. A claim of unfair competition must be founded upon the common law of Missouri. *Fry v. Layne-Western Company*, 282 F.2d 97, 99 (8th Cir. 1960). Plaintiffs have cited no judicial precedent in Missouri supporting their cause of action for unfair competition. The Court does not construe plaintiffs' amended complaint as stating such a claim. The term "unfair competition" is used by plaintiffs for the purpose of stating a claim that 12 U.S.C. §1731b, *infra*, was violated. Assuming that plaintiffs seek to allege unfair competition, as they argue, the Court is of the opinion that they fail to state a claim upon which relief can be granted. As shown below, plaintiffs either lack standing or fail to state a claim regarding those acts of the defendants upon which their claim of unfair competition depends.

⁸ Article I, §10, Constitution of Missouri, provides:

In order to assert our rights, acknowledge our duties, and proclaim the principles on which our government is founded, we declare: . . .

Section 10. Due process of law. That no person shall be deprived of life, liberty or property without due process of law.

Plaintiffs allege the following injuries:

46. Plaintiffs will suffer special, extensive and peculiar injury, loss and damage by the intended, proposed and contemplated change in the use of the Mansion House South Tower from a residential apartment use to hotel use. Plaintiffs further state that said intended change is imminent. Further, plaintiffs will be aggrieved, hurt and their property rights diminished and denied by the intended imminent change from apartment use to hotel use.

47. Plaintiffs further state that as a result of the above intended acts and charges, Plaintiffs will suffer immediate and irreparable injury, loss and damage and will continue to sustain irreparable damage and that Plaintiffs have no adequate remedy at law. Each Plaintiff will sustain damages in excess of Ten Thousand Dollars (\$10,000.00) as a result of Defendants' conduct.

Plaintiffs seek declaratory and injunctive relief prohibiting the hotel conversion and setting aside the Third Modification Agreement. Plaintiffs allege jurisdiction under 28 U.S.C. § 1331(a) (federal question), § 1332 (diversity of citizenship), § 1731b (National Housing Act), and pendent jurisdiction (asserted in oral argument).

Defendants' motions raise the issues of whether subject matter jurisdiction exists and whether plaintiffs have stated a claim upon which relief can be granted. Fed. R. Civ. Pro. 12(b)(1), (b)(6).

Plaintiffs' first, second, third and fifth claims involve violations of federal law. Their fourth claim arises under the law of Missouri. Since defendant City of St. Louis, defendant Mansion House Center South Redevelopment Corporation, and plaintiff Madesco Investment Corporation are Missouri citizens, diversity of citizenship subject matter jurisdiction of the fourth claim does

not exist. See 28 U.S.C. § 1332. Jurisdiction of these claims exists, if at all, as pendent to the Court's jurisdiction and disposition of the plaintiffs' first, second, third and fifth claims.

Regarding all of plaintiffs' claims defendants assert that plaintiffs lack standing to sue. Plaintiffs' standing is dependent upon showing (1) that the challenged action caused plaintiffs an injury in fact, economic or otherwise, and (2) that the injury was to an interest arguably within the zone of interests protected or regulated by the statutes that are claimed to have been violated. *Data Processing Service v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970); *Coalition for the Environment v. Volpe*, 504 F.2d 156 (8th Cir. 1974). The first of these requirements relates to the existence of a case or controversy, a jurisdictional prerequisite under Article III, § 2 of the Constitution of the United States. The second requirement reflects the power of Congress to regulate the jurisdiction of the federal judiciary. *Sierra Club v. Morton*, 405 U.S. 727, 732 n. (1972); *Davis v. Romney*, 490 F.2d 1360, 1363 (3rd Cir. 1974).

Notice pleading of the required injury is sufficient. *Higgenbotham v. Barrett*, 473 F.2d 745, 748 (5th Cir. 1973). Plaintiffs have alleged monetary damages which resulted, at least indirectly, from the ability of the Mansion House defendants to obtain federally backed financing at lower rates of interest than would otherwise be available. This allegedly puts the Mansion House south tower in a strong competitive position. By the affidavit of Norman K. Probst, Exh. 15 to plaintiffs' motion for summary judgment, plaintiffs show that they made capital expenditures and would suffer the loss of individual customers as a result of the south tower conversion. The Court finds these assertions by plaintiffs of economic injury in fact are sufficient to confer standing as competitors of the south tower hotel operation.⁹ Next, they must show that the statutory

⁹ Since the filing of plaintiffs' amended complaint, as all parties have agreed impliedly in oral argument, the conversion of the south tower to a hotel has become an accomplished fact.

and constitutional requirements they seek to enforce are concerned with protecting plaintiffs against injury to their interests as hotel competitors. See *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 5-6 (1968).

The overall purposes of the National Housing Act do not include the regulation or protection of competition among hotel operators. The intentions of Congress regarding the Act have been variously described as the "aid[ing of] veterans and their families", *F.H.A. v. The Darlington, Inc.*, 358 U.S. 84, 87 (1958), and the providing of decent homes for persons with low income. *Davis v. Romney*, *supra* at 1365; *Thompson v. Washington*, 497 F.2d 626 (D.C. Cir. 1973). Congress declared the purpose of § 220 of the Act (urban development) to be "to aid in the elimination of slums and blighted conditions and the prevention of the deterioration of residential property . . ." 12 U.S.C. § 1715k(a).

Plaintiffs' first and third claims allege impropriety in the decision making process which led to the conversion approval by the Secretary. The authority of the Secretary to make the decision at issue after assignment of the mortgage and after payment of the insurance proceeds finds support in the following language of 12 U.S.C. § 1713(k):

Pending such acquisition by voluntary conveyance or by foreclosure, the Secretary is authorized, with respect to any mortgage assigned to him . . ., to exercise the rights of a mortgagee under such mortgage, including the right . . . to take such action . . . as may be necessary to preserve or protect the lien of such mortgage. (emphasis added).

See 12 U.S.C. § 1715k(f)(2).

The sole intention of Congress in enacting this language clearly appears to be the protection of the government's lien when recouping its investment. Cf., *United States v. Sylacauga*

Properties, Inc., 323 F.2d 487, 492 (5th Cir. 1963). The plaintiffs' interests as hotel competitors are not within the scope of interests protected or regulated by this section. The first and third claims relate solely to this provision and, therefore, with regard to these claims the Court concludes that plaintiffs are without standing to sue. See, e.g., *Alabama Power Co. v. Ickes*, 302 U.S. 464, 480-483 (1938); *Taft Hotel Corporation v. Housing and Home Finance Agency*, 262 F.2d 307 (2nd Cir. 1958); *Gibson & Perin Co. v. City of Cincinnati*, 480 F.2d 936 (6th Cir. 1973). In thus determining that plaintiffs' first and third claims must be dismissed, the Court is not ruling the merits of the allegations, merely the standing of plaintiffs to litigate them. The allegedly wrongful and illegal acts of defendants may be litigated in actions brought by persons or governmental agencies with sufficient standing or authority. In this respect, the Court notes, for example, that H.U.D., through the letter of H. R. Crawford, Assistant Secretary for Housing Management, dated April 11, 1975, charges the Mansion House defendants with certain improprieties and makes demand upon certain of the defendants for sums owed to H.U.D. regarding the Mansion House project regulatory and modification agreements.

In plaintiffs' second claim they allege violations of 12 U.S.C. §§1715k(d)(3)(B)(iv) and 1731b, *supra* at n. 5 and n. 6. In spite of defendants' arguments to the contrary the Court is of the opinion that the following language of these sections arguably protects the interests of plaintiffs as hotel competitors:

1) "[T]he Secretary shall give due consideration to the possible effect of the project on other business enterprises in the community."

12 U.S.C. §1715k(d)(3)(B)(iv).

2) "Any person owning or operating a hotel within a radius of fifty miles of a place where a violation of any provision of this section has occurred or is about to oc-

cur, or any group or association of hotel owners or operators within said fifty-mile radius, at his or their sole charge or cost, may petition any district court . . . for [injunctive relief]."

12 U.S.C. §1731b(i).

The Court is careful to distinguish plaintiffs' standing in the jurisdictional sense from the issue of whether they state a claim upon which relief can be granted. A commentator has stated:

A plaintiff might be sufficiently within the zone of protected interests to invoke judicial review, but sufficiently outside the zone of protected interests to be denied relief even for a proved violation. This implication of itself suggests that standing will be accorded across a broad range of arguably protected interests.

13 Wright and Miller, Federal Practice and Procedure, §3531, p. 201 (1975 ed.); *but see* Davis, Administrative Law Treatise 1970 Supplement, §22.00-1, p. 709.

While plaintiffs have standing to litigate their second claim, there being jurisdiction therefor under 12 U.S.C. §1731b(j) and 28 U.S.C. §1331(a), the Court is persuaded that they fail to state a claim upon which relief can be granted.

Section 1715k(d)(3)(B)(iv) of Title 12, U.S.C., *supra* at n. 5, by its very language provides for findings and considerations required of the Secretary concerning the effect that a nondwelling facility in a mortgaged project will have on other business enterprises in the community, which considerations are to be made *in advance of* putting federal mortgage insurance into effect. It clearly appears from the documents on file and the arguments of counsel that the actions by the defendants of which the plaintiffs complain occurred at a time *after* the insurance had been put into effect and, further, after default under the mortgage had occurred, after

the insurance proceeds had been paid by the Secretary to the mortgagee, and after the mortgage and the note had been assigned to the Secretary. Clearly no claim for relief is stated under §1715k(d)(3)(B)(iv).

Section 1731b of Title 12, U.S.C., *supra* at n. 6 in similar fashion, operates as a constraint upon the Secretary with regard to the use to which a §220 project may be put—but only during such period as the H.U.D. mortgage insurance remains outstanding. There is no genuine issue of fact regarding the status of the insurance in this action. The insurance proceeds were paid to the mortgagee in 1972; thereafter, the subject insurance was no longer "outstanding" within the meaning of the statute. *See Hardy v. Savannah Apartments, Inc.*, 217 F. Supp. 649, 655 (S.D. Ga. 1962). Thus, no claim is stated under §1731b.

Plaintiffs argue the applicability of three H.U.D. regulations promulgated under §211 (12 U.S.C. §1715b) and §220 (12 U.S.C. §1715k) of the Act. First, 24 C.F.R. §220.593 provides as follows:

Certificate regarding use for transient or hotel purposes. The borrower shall certify under oath, that so long as the loan is insured by the Commissioner, the borrower will not rent, permit the rental or permit the offering for rental of the housing, or any part thereof, covered by such loan for transient or hotel purposes. For the purpose of this certificate, the term rental for transient or hotel purposes shall mean:

- (a) Rental for any period less than thirty days; or
- (b) Any rental, if the occupants of the housing accommodations are provided customary hotel services such as room service for food and beverages, maid service, furnishing and laundering of linens and bell-boy service.

As with 12 U.S.C. § 1731b, this regulation of the Secretary is inapplicable since the south tower mortgage is no longer insured. However, plaintiffs also argue that they are third party beneficiaries of the mortgagor's oath executed in 1964 with respect to the south tower. This oath is as follows in pertinent part:

To the Federal Housing Administration:

In accordance with the stated intent of Congress and with the provisions of the National Housing Act, as amended, . . . the undersigned hereby certifies:

That so long as the mortgage covering the above numbered project *is insured or held* under the provisions of the National Housing Act, as amended, no part of any building will be rented for a period of less than thirty days or operated in such a manner as to offer any hotel services to any tenant in the building or buildings; . . . (Emphasis Added).

This oath was executed by the mortgagor. Insofar as the oath prohibits the mortgagor from using the south tower for transient hotel purposes after the insurance coverage was terminated by payment of the proceeds, it exceeds the requirements of 12 U.S.C. § 1731b and 24 C.F.R. § 220.593. The oath is in effect a promise by the mortgagor to H.U.D. through the Federal Housing Administration. Any benefit that results to the plaintiffs by this promise is strictly incidental. No allegation is made by the plaintiffs and they do not show by extra-pleading materials that they are the intended donee or creditor beneficiaries of the mortgagor's oath. Therefore, they are unable to enforce it against either the Secretary or the mortgagor. Simpson on Contracts, § 116, p. 245 (2nd ed.).

Similarly, plaintiffs argue that they are third party beneficiaries of the Regulatory Agreement executed by the mortgagor and H.U.D. in April, 1964. This agreement provided that

so long as the Contract of Mortgage Insurance continues in effect, and during such period of time as the commissioner shall be the owner, *holder* or reinsurer of the mortgage, . . .

4(a) . . . Such accommodations shall not be rented for a period of less than thirty (30) days . . . (Emphasis added).

As with the mortgagor's oath, treated above, plaintiffs are only incidental beneficiaries of the Regulatory Agreement and may not claim relief for its violation.

Plaintiffs also invoke 24 C.F.R. §§ 220.594,¹⁰ 220.600¹¹ and 207.16(b),¹² H.U.D. regulations, but to no avail. Plaintiffs seek to show that these regulations prohibit the defendants from allowing the south tower to be used for a purpose other than apartment residences as provided by St. Louis City Ordinance No. 50033 and as it was to be operated when the mortgagee originally loaned capital to the project. These regulations, in the opinion of the Court, bind the mortgagor and the mortgagee, at a time before the mortgage is assigned to the Secretary, to effectuate the principles and purposes of the National Housing Act.

¹⁰ 24 C.F.R. § 220.594 provides:

Zoning, deed or building restrictions.

The project when rehabilitated shall not violate any material zoning or deed restrictions applicable to the building site, and shall comply with all applicable building and other governmental regulations.

¹¹ 24 C.F.R. § 220.600 provides:

Covenant relating to use of property.

When the principal amount of the loan exceeds \$40,000, the security instrument shall contain a covenant prohibiting the use of the property covered thereby for any purpose other than that for which it was intended, at the date the loan was executed.

¹² 24 C.F.R. § 207.16(b) provides:

(b) The mortgage shall contain a covenant prohibiting the use of the property covered thereby for any purpose other than that for which it was intended at the date the mortgage was executed.

Through such regulations the Secretary controls the use of the property. After the mortgage was assigned to the Secretary, these regulations became inapplicable as a constraint on the Secretary from modifying the property use by subsequent agreement. The Secretary was then authorized by 12 U.S.C. § 1713 (k) to "take such action . . . as may be necessary to preserve or protect the lien of such mortgage".

The fact that H.U.D. officials modified a long-standing policy by allowing this project to be used for hotel purposes, if true as argued, is immaterial in light of the Secretary's responsibility under § 1713(k), so long as plaintiffs' rights under other constitutional, statutory or regulatory provisions are not violated. The Court is of the opinion that no such other rights were violated.

Plaintiffs' fifth claim, for violation of the Fourteenth Amendment, must be dismissed for the reason that no economic loss sustained by the plaintiffs is alleged or shown to be caused by a direct intrusion, encroachment or appropriation of plaintiffs' property. *Woodland Market Realty Co. v. City of Cleveland*, 426 F.2d 955, 958 (6th Cir. 1970). There is no factual allegation or showing that plaintiffs were not afforded equal protection of law. This claim will be dismissed for failure to state a claim upon which relief can be granted.

The Court, having concluded that those claims under which plaintiffs invoke federal substantive law must be dismissed, must determine, in its discretion, whether pendent jurisdiction of the state claim should be exercised. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966). Since federal regulatory policy and authority infuses all of plaintiffs' allegations, the Court believes that plaintiffs' claim that Missouri law has been violated should be resolved with their other claims. *Id.*

Regarding their claim that defendants' actions violate Article I, § 10 of the Missouri Constitution, City Ordinance No. 50033, and section 353.110, RSMo, the Court believes that plaintiffs

lack standing to use. Plaintiffs' hotel operations are not alleged to lie inside the subject urban redevelopment area and their damages are occasioned by loss of customers and profit (not by direct governmental taking). Article I, § 10 of the Missouri Constitution protects property from governmental deprivation without due process. *In re Chambers' Estate*, 18 S.W.2d 30, 31 (Mo. en banc 1929). No such deprivation occurred here. Section 353.110, RSMo, provides for the exemption from ad valorem taxes on the real property of redevelopment corporations. No cause of action for a party with no interests inside the redevelopment area is thereby created; plaintiffs' interests as competitors of the south tower are not included among the interests regulated or protected by this statute. The same can be said with regard to City Ordinance No. 50033. That ordinance, as amended, regulates the subject redevelopment project. The interests protected thereby belong to the City, the developer, and those with interests within or affected directly by the project. Plaintiffs have failed to show injury to any such interest.

By order filed January 16, 1975, this Court enjoined the plaintiffs from prosecuting a civil action, *Boulevard Investment Co. v. City of St. Louis*, Cause No. 49519-F, in the Circuit Court of the City of St. Louis. A judicial determination in that action, this Court then believed, could limit the efficacy of a judgment which might be entered in this action. That situation no longer exists and the Court *sua sponte* will vacate that injunction.

In conclusion, the Court will sustain defendants' motions for summary judgment and dismiss with prejudice the complaint as to plaintiffs' first, third and fourth claims for lack of standing; and with prejudice as to their second and fifth claims for failure to state a claim upon which relief can be granted. Plaintiffs' motion for summary judgment will be denied.

/s/ JOHN F. NANGLE

United States District Judge

Dated: May 27, 1975.

APPENDIX D

**United States Court of Appeals
for the Eighth Circuit**

75-1563

September Term, 1976

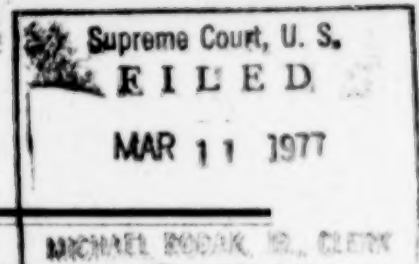
Rodeway Inns of America, Inc., et al.,	}	Appeal from the United States Dis- trict Court for the Eastern District of Missouri
vs.		
Maurice B. Frank, et al.,		
	Appellants,	
	Appellees.	

The Court having considered petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

October 12, 1976

No. 76-947



In the Supreme Court of the United States

OCTOBER TERM, 1976

RODEWAY INNS OF AMERICA, INC., ET AL., PETITIONERS

v.

MAURICE B. FRANK, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT*

**MEMORANDUM FOR THE FEDERAL RESPONDENT
IN OPPOSITION**

DANIEL M. FRIEDMAN,
*Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

In the Supreme Court of the United States

OCTOBER TERM, 1976

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**MEMORANDUM FOR THE FEDERAL RESPONDENT
IN OPPOSITION**

Pursuant to the provisions of the National Housing Act, 48 Stat. 1246, 12 U.S.C. 1701 *et seq.*, Mansion House Center, a housing project in St. Louis, Missouri, was endorsed for mortgage insurance by the Department of Housing and Urban Development (HUD) in September 1967. The project, a group of three separately mortgaged apartment towers, had a financially troubled history from its inception. Prior to 1971, the mortgagees twice had modified the terms of the mortgages to provide for the deferment of principal payments. In late 1971 all three mortgages went into default; the mortgages were assigned to HUD pursuant to 12 U.S.C. 1713g, and in March 1972, HUD paid insurance claims totalling approximately \$35.3 million. HUD determined not to foreclose on the mortgage and, in August 1972, entered into a third modification

agreement with the mortgagors. Subsequently, after substantial discussion, HUD permitted the mortgagors of the South Tower to convert that building from residential to hotel use (Pet. App. B, pp. A-6 to A-10).

Petitioners, competing hotel owners, then instituted this action against the owners of the South Tower and the Secretary of HUD, contending (1) that the Secretary's decision to allow conversion was reached improperly, (2) that conversion was barred by 12 U.S.C. 1715k(d)(3)(B)(iv) and 1731b, (3) that the owners fraudulently induced the Secretary to allow conversion, (4) that the conversion violated state law and city ordinances, and (5) that conversion denied them due process and equal protection (Pet. App. C, pp. A-25 to A-27). The district court rejected contentions (2) and (5) on the merits and held that petitioners lacked standing to assert contentions (1), (3), and (4) (Pet. App. C). The court of appeals affirmed (Pet. App. B).¹

The decisions below are correct and do not conflict with the decisions of this Court or of other courts of appeals.

1. The conversion of South Tower to hotel use was not barred by the National Housing Act. Petitioners principally rely upon 12 U.S.C. 1731b, in which Congress declared its intention to "exclude[] the use of * * * housing [built with the aid of federally insured mortgages] for transient or hotel purposes while such insurance on the mortgage remains outstanding." 12 U.S.C. 1731b(a).² But the court of appeals correctly pointed out (Pet. App. B, p. A-14):

By its clear terms [this provision] applies only 'while the mortgage insurance remains outstanding.' In

¹Petitioners did not raise contention (5) on appeal (Pet. App. B, p. A-9).

²The statute permits persons owning or operating a hotel within a radius of fifty miles of a project used for transient or hotel purposes to

the present case the mortgage insurance has been terminated, the insurance benefits have been paid to the original mortgagee, and that mortgagee has assigned the mortgage to HUD. Thus, no right to relief exists under [12 U.S.C.] 1731b.

Moreover, as the court further noted (Pet. App. B, p. A-13), "[t]he language limiting the application of the section to the period 'while such insurance on the mortgage remains outstanding' does not appear to be a mere slip of the pen." Congress intended the Secretary, "[n]otwithstanding any other provision of law" (12 U.S.C. 1713(l)), to have maximum leeway in dealing with property covered by assigned mortgages, in order to minimize the financial loss to the taxpayers.

2. Petitioners lacked standing to raise their claims that the Secretary's decision to allow conversion was reached improperly or was fraudulently induced.³ The court of appeals correctly began with the test enunciated by this Court in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153, and *Barlow v. Collins*, 397 U.S. 159, 164, which requires that a would-be plaintiff allege injury in fact and that the plaintiff's interests arguably come within the "zone of interests to be protected by" the relevant statute. As the court of appeals found, the "overall intent of Congress" in passing the National Housing Act "was to aid home construction, not to protect

sue to enjoin a violation of that provision. 12 U.S.C. 1731b(i). Thus petitioners had standing to assert an alleged violation of that statute.

³The district court held that petitioners lacked standing to challenge the conversion as a violation of state and local urban renewal laws (Pet. App. C, pp. A-36 to A-37). The court of appeals affirmed, holding that it found no error in the district court's interpretation of state law (Pet. App. B, p. A-20). That narrow issue does not warrant further review by this Court.

hotel owners from the competitive impact of projects built with government-insured loans" (Pet. App. B, p. A-18).

In reaching this conclusion, the court held that it was necessary to "examine the National Housing Act as a whole, as well as the specific statutory provisions. *Barlow v. Collins*, 397 U.S. 159, 164-165 (1970)" (Pet. App. B, p. A-17). The court then correctly adopted the district court's reading of the statutory purpose (Pet. App. B, pp. A-17 to A-18, quoting from Pet. App. C, p. A-30):

The overall purposes of the National Housing Act do not include the regulation or protection of competition among hotel operators. The intentions of Congress regarding the Act have been variously described as the "aid[ing of] veterans and their families", *F.H.A. v. The Darlington, Inc.*, 358 U.S. 84, 87 (1958), and the providing of decent homes for persons with low income. *Davis v. Romney*, *supra* at 1365; *Thompson v. Washington*, 497 F. 2d 626 (D.C. Cir. 1973). Congress declared the purpose of §220 of the Act (urban development) to be "to aid in the elimination of slums and blighted conditions and the prevention of the deterioration of residential property . . ." 12 U.S.C. §1715k(a).

Petitioners rely upon 12 U.S.C. 1715k(d)(3)(B)(iv) for the proposition that Congress intended to protect competing hotel operators.⁴ That statute requires that, in considering applications for mortgage insurance, the Secretary must "give due consideration to the possible effect of the project on other business enterprises in the community." Thus that

⁴Petitioners also rely upon 12 U.S.C. 1731b(i). But that statute only confers standing for the narrow purpose of challenging alleged violations of Section 1731b (see note 2, *supra*). Petitioners were granted the full degree of standing conferred by that provision.

provision, like 12 U.S.C. 1731b (see pp. 2-3, *supra*), relates solely to the operation of the project while HUD mortgage insurance is outstanding. Once it is necessary for HUD to pay insurance claims and accept assignment of the mortgage, the Secretary's discretion to deal with the property is unfettered by any restriction on commercial use. See 12 U.S.C. 1713(l). Accordingly, the court of appeals correctly determined that petitioners were outside "the zones of protection defined by Congress" (Pet. App. B, p. A-18).⁵

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MARCH 1977.

⁵*Davis v. Romney*, 490 F. 2d 1360 (C.A. 3), is not to the contrary. There, the court of appeals held that purchasers of federally-insured homes had standing to litigate the question whether standards for federal mortgage insurance were properly adhered to, on the ground the interest of eligible families in obtaining decent housing is "[b]eyond dispute * * * among the interests protected by the National Housing Act." 490 F. 2d at 1365. The decision below does not conflict with that decision.